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State v. Boehm Respondent's Brief Dckt. 41594

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. ANGELA MARIE BOEHM, Defendant-Appellant.	)	No. 41594 Kootenai Co. Case No. CR-2013-675

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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Nature of the Case

Angela Marie Boehm appeals from the district court's intermediate appellate decision affirming her convictions for misdemeanor driving under the influence of alcohol (DUI) and driving without privileges (DWP).

Statement of the Facts and Course of the Proceedings

Law enforcement responded to a two-vehicle crash after 10 pm on January 10, 2013. (R., p.22.) Boehm "slid through" a stop sign before her vehicle was hit by a pickup. (R., p.21.) Boehm repeatedly turned away from Officer Neal as he was attempting to talk to her. (Id.) He observed Boehm was "swaying back and forth" and "slurring her words" while she was talking on her phone. (Id.) The officer could smell "the strong odor of alcoholic beverage emanating" from Boehm when he standing downwind from her. (Id.) Boehm admitted to drinking just one beer some three hours earlier. (Id.) Boehm failed the field sobriety tests and was taken into custody. (R., pp.21-22.) Once at the police station, the officer observed Boehm for the "required observation period" and read her the ALS form. (R., p.22.) After indicating she understood her rights, Boehm provided a breath alcohol sample with a .192/.183 result. (R., p.22.) Upon discovering Boehm's driver's license was suspended for unpaid tickets, the police officer issued her citations for DUI and DWP. (R., p.22.)

Boehm filed multiple motions before the trial court, including a motion to suppress, *in limine*, to sever, and to compel. (R., pp.33-53, 57-72.) Following a

hearing on the motions, the trial court denied them all, including Boehm's motion to sever her charges for purposes of jury trial, finding no undue prejudice to Boehm in joining for trial a DWP and DUI charge which arose out of the same incident. (Tr., p.4, Ls.8-25.)

Boehm's motion to compel "basically request[ed] [ ] that [the state] have a copy of the maintenance logs" relating to the Intoxilyzer used in Boehm's BAC test available "in their office." (Tr., p.7, Ls.18-20.) In its discretion, the trial court denied Boehm's motion to compel holding that the state had the duty under Rule 16 to respond to the discovery requests and had done that. (Tr., p.12, L.2 – p.14, L.12.) The court concluded the state's direction to Boehm as to where the items requested could be located in addition to making them available for Boehm's review was sufficient compliance with the rule:

> I don't find that the City Prosecuting Attorney, under the circumstances of this case, has an affirmative duty to go and obtain all of those documents, since they're not within the possession and control of the City, and then turn them over, so that they can be reviewed by the defense.
>
> The defense, if they think that those documents are necessary, can certainly make arrangements to view the documents, obtain copies of the documents from the appropriate agency, or subpoena any of the documents, if need be, to a hearing or trial.

(Tr., p.14, Ls.13-23.)

Boehm's motion *in limine* moved the court to preclude the state from introducing any evidence of her BAC results at trial, contending the failure of the Idaho State Police (ISP) to comply with the rulemaking requirements of the Idaho Administrative Procedures Act (IDAPA) in adopting Standard Operating

Procedures (SOPs) and other methods for breath testing "makes all such testing too unreliable for use at a criminal trial under I.C. §18-8004." (R., p.44.) The court denied the motion *in limine* without prejudice, reserving the issue for trial. (Tr., p.16, L.6 – p.19, L25.)

Boehm entered into negotiations for a conditional guilty plea, reserving the right on appeal to challenge the denial of her motions to sever, to compel, to suppress, and *in limine*. (Tr., p.67, Ls.2-6.) At the time set for sentencing, Boehm argued to withdraw her guilty plea based on a recent United States Supreme Court decision. (R., pp.209-210; Tr., p.67, Ls.19-22.) The court denied Boehm's motion to withdraw her plea, maintained Boehm's conditional plea and imposed sentence. (Tr., p.76., Ls.1-6, p.82, L.2 – p.83, L.5; R., pp.224-228, 235-236.) Boehm timely appealed to the district court (R., pp.231-234), which affirmed (R., pp.359-360). Boehm again timely appeals. (R., pp.361-365.)

ISSUES

Boehm states the issues on appeal as:

I. The District Court erred in upholding the Magistrate's finding that a joint trial of a driving without privileges offense with a driving under the influence offense would not result in unfair prejudice to the defendant.

II. The District Court erred in upholding the Magistrate's finding that the state had not violated the defendant's constitutional rights by refusing to seek out various documents and turn them over to the defendant per request.

III. The District Court erred in finding that the defendant's Motion in Limine was not properly preserved for appeal.

IV. The Magistrate Court and District Court erred in not finding that no method for the administration of evidentiary testing exists as required by I.C. § 18-8004 and therefore the results of the evidentiary test must be excluded in this case.

V. The District Court erred in upholding the Magistrate's finding that *McNeely* did not create newly discovered law such that allowing the defendant to withdraw her plea was just.

(Appellant's brief, p.8.)

The state rephrases the issues as:

1. Has Boehm failed to show the magistrate abused its discretion in denying her motion to sever?

2. Has Boehm failed to show error in the magistrate's denial of her motion to compel?

3. Has Boehm failed to establish any basis for the reversal of her conviction based on her claim that ISP has failed to establish methods to ensure the reliability of BAC test results?

4. Has Boehm filed to show error in the denial of her motion to withdraw her guilty plea?

ARGUMENT

I.
Boehm Has Failed To Show Error In The Denial Of Her Motion To Sever

A. Introduction

Boehm argued the court should sever her DWP and DUI charges for purposes of jury trial because "there was a grave risk that the jury may find that the defendant, being the 'type' of person who ignores license suspensions, would also be the type of person who would drive while intoxicated." (Appellant's brief, p.11.) The state argued below that severance of the charges was improper because they were "within the same act or transaction." (Tr., p.4, Ls.5-6.) The trial court in its discretion denied the motion to sever finding no prejudice would result where the DUI and DWP charges arose from the same driving conduct. (Tr., p.4, Ls.8-25.) Application of the relevant law to the facts of this case shows no error.

B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court "examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Id. "If those findings are so supported and the conclusions follow therefrom and if

the district court affirmed the magistrate's decision, [the appellate court] affirm[s] the district court's decision as a matter of procedure." Id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

Whether counts are properly joined is a question of law given free review. State v. Field, 144 Idaho 559, 564, 165 P.3d 273, 278 (2007). A motion to sever properly joined counts because of prejudice, however, is directed to the trial court's discretion. Id. at 564-65, 165 P.3d at 278-79; State v. Eguilior, 137 Idaho 903, 907, 55 P.3d 896, 900 (Ct. App. 2002).

C. The Magistrate Court Properly Denied Boehm's Motion To Sever The Trials Of Her Driving Without Privileges And Driving Under The Influence Charges

Counts are properly joined in a single charging document if they are either "based on the same act or transaction" or, if based on different acts or transactions, those acts or transactions are "connected together or constituting parts of a common scheme or plan." I.C.R. 8(a). "Two crimes are 'connected' together if the proof of one crime constitutes a substantial portion of the proof of the other." United States v. Montes-Cardenas, 746 F.2d 771, 776 (11th Cir., 1984). "In determining whether the connection between the acts charged is sufficient to meet the requirements of joinder under Rule 8(a), the court should be guided by the extent of evidentiary overlap." United States v. Berardi, 675 F.2d 894, 899-900 (7th Cir., 1982). "Whether joinder is proper is determined by what is alleged, not what the proof eventually shows." Field, 144 Idaho at 565, 165 P.3d at 279.

The purpose of joinder is to promote judicial efficiency and "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." United States v. Lane, 474 U.S. 438, 449 (1986) (quoting Bruton v. United States, 391 U.S. 123, 134 (1968)). For these reasons, federal courts and other state courts broadly construe their nearly identical rules in favor of joinder. United States v. Rock, 282 F.3d 548, 552 (8th Cir. 2002) (noting federal rule 8(a) is broadly construed in favor of joinder); State v. Reeder, 182 S.W.3d 569, 576 (Mo. Ct. App. 2006) (noting that "liberal joinder" is favored in the interest of judicial economy).

The trial court's determination that the charges were based on the same act or transaction is correct. Boehm was contacted by police after being involved in a vehicle crash. Her driving is the basis for both charges. Boehm has failed to show that the district court erred by concluding the counts were properly joined.

Even where charges are properly joined, however, a motion to sever may still be granted if the party making the motion demonstrates prejudice from trying the charged counts together. I.C.R. 14. "When reviewing an order denying a motion to sever, the inquiry on appeal is whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial, which denied the defendant a fair trial." State v. Eguilior, 137 Idaho 903, 908, 55 P.3d 896, 901 (Ct. App. 2002). The potential sources of unfair prejudice from denial of severance are that the jury may have confused and cumulated evidence; the potential the defense was confounded in presenting a defense; and the possibility the jury convicted based on bad character instead of the evidence

presented. Id. A defendant moving to sever has the burden of showing the district court that joinder is prejudicial. State v. Dambrell, 120 Idaho 532, 537, 817 P.2d 646, 651 (1991). Even where joinder is ultimately deemed improper, harmless error analysis applies. State v. Anderson, 138 Idaho 359, 362, 63 P.3d 485, 488 (Ct. App. 2003).

Boehm has also shown no prejudice from the proper joinder. The district court concluded that no defenses would be compromised and appropriate jury instructions would minimize any potential prejudice. (Tr., p.4, Ls.16-24.) Boehm simply disagrees with the court's conclusion and the jury's ability to follow instructions. (Appellant's brief, pp.11-12.) Boehm has failed to show actual prejudice, and therefore failed to show any abuse of discretion.

II.
Boehm Has Failed To Establish The District Court Abused Its Discretion In Denying Her Motion To Compel Discovery

A. Introduction

Boehm argues the district court erred when it upheld the trial court's "finding that no violation of the defendant's right to Due Process when the prosecutor did not seek out possibly exculpatory evidence to review and refused to provide copies to the defendant." (Appellant's brief, p.12.) Boehm's claim fails. The trial court correctly concluded the state complied with I.C.R. 16 by disclosing the requested information and as such, did not abuse its discretion in denying Boehm's motion to compel.

B. Standard Of Review

The standard of review applicable to a decision rendered by a district court in its intermediate appellate capacity is set forth in Section I.B., *supra*, and is incorporated herein by reference.

Trial courts have broad discretion in determining whether or not to grant a motion to compel. See I.C.R. 16(k); Kirk v. Ford Motor Co., 141 Idaho 697, 700, 116 P.3d 27, 30 (2005); Storm v. Spaulding, 137 Idaho 145, 149, 44 P.3d 1200, 1204 (Ct. App. 2002).

C. The Trial Court Correctly Concluded The State Had Met Its Discovery Requirements Under I.C.R. 16

I.C.R. 16 provides upon the request of a defendant,

> the prosecuting attorney shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are in the possession, custody or control of the prosecuting attorney and which are material to the preparation of the defense, or intended for use by the prosecutor as evidence at trial, ...

I.C.R. 16(b)(4).

Boehm filed a motion to compel the production of seven separate items, asserting they had not been "turned over to the defendant." (R., p.50.) Five of those items are at issue on appeal:

> 2. A copy of the manual of procedures governing the administration of breath tests at the Kootenai County Public Safety Building.
>
> 3. The date of any repairs or maintenance performed on the Intoxilyzer 68-013328 used in this matter to test the defendant's blood alcohol, during the three months prior to the testing of the defendant, and the nature of any such repairs.

> 4. The date of any repairs or maintenance performed on the Intoxilyzer 68-013328 used to test the defendant's blood alcohol, from the date of testing of the defendant up to the date of trial, and the nature of such repairs or maintenance.
>
> 5. The number of times within the last two years that the Intoxilyzer 68-013328 used to test the defendant's breath has been tested to determine its ability to detect acetone or other "interferants," and the result of any such tests.
>
> 6. A copy of any repair or maintenance log kept with regard to the machine which was used to test the defendant's breath or blood.

(R., pp.50-51.) In its response to Boehm's motion to compel, the state recounted its previous responses to Boehm's discovery requests which included directing Boehm to schedule appointments with specified agencies or the prosecutor's office to inspect the requested materials. (See R., pp.53-56 (Plaintiff's Response to Defendant's Motion to Compel).)

The trial court denied Boehm's motion to compel, finding the state complied with I.C.R. 16 by making the requested documents available to Boehm. (Tr., p.11, L.23 – p.14, L.18.) Boehm concedes the state was not required by rule or statute to copy and deliver the requested documents to her. (Appellant's brief, p.14.) She argues, however, that because it is not a burden for the state to provide such documents to defendants, failing to do so "is a violation of the defendant's right to effective assistance of counsel and due process." (Appellant's brief, pp.14-15.) It is not the state's responsibility to gather evidence for a defendant or investigate his or her case. State v. Bryant, 127 Idaho 24, 28, 896 P.2d 350, 354 (Ct. App. 1995); Queen v. State, 146 Idaho 502, 506, 198 P.3d 731, 735 (Ct. App. 2008). Although Boehm asserts the evidence she

requested was "plainly possibly exculpatory evidence" (Appellant's brief, p.13), she does not indicate how that would require a higher burden on the state than complying with ICR 16.

Boehm has failed to show the state was not in compliance with ICR 16 and therefore has failed to establish the trial court abused its discretion in denying her motion to compel.

III.

Boehm Has Failed To Show Any Basis For Reversal Based On Her Claim That ISP Has Failed To Establish Methods To Ensure The Reliability Of BAC Test Results

A. Introduction

Boehm argues the trial court erred in conditionally denying her motion *in limine* seeking to exclude evidence at trial of her breath alcohol level without making a finding on the underlying issue. (Appellant's brief, p.16.) Boehm contends the lower courts erred by not "finding that a violation of I.C. § 18-8004 (4) would prevent the admission of breath test results because the statute plainly requires that a method exist for the testing of the breath." (Id.)

Specifically, Boehm asserts that her breath test results were inadmissible, and should have been ruled as such prior to trial, because the failure of ISP to comply with the rulemaking requirements of the IAPA in creating SOPs and manuals for breath alcohol testing renders those SOPs and manuals void and all BAC testing based on those standards too unreliable for use at a criminal trial. (Appellant's brief, pp.18-24.)

This argument fails for several alternative reasons. Initially, the trial court did not abuse its discretion by deferring ruling on the admissibility of

evidence until trial. If this Court reaches the merits of Boehm's claims even though not ruled on by the trial court, these claims for three reasons. First, nothing in I.C. § 18-8004(4) requires formal rulemaking as a prerequisite to the admissibility of results of breath tests performed pursuant to methods approved by ISP. Second, if ISP's creation of the SOPs is agency action governed by the requirements of the IAPA, Boehm's exclusive means for challenging such action was through the judicial review provisions of the IAPA; she has no standing to raise, and neither the lower courts nor this Court have jurisdiction to consider, a challenge to the validity of the SOPs as a basis for excluding breath test results in a criminal case. Finally, correct application of the law shows the SOPs are not rules and, as such, no compliance with the formal rulemaking requirements of the IAPA was required.

B. Standard Of Review

The standard of review applicable to a decision rendered by a district court in its intermediate appellate capacity is set forth in Section I.B., *supra*, and is incorporated herein by reference.

"When a decision on a motion addressing the admissibility of evidence is challenged, [the appellate court] defer[s] to the trial court's findings of fact supported by substantial and competent evidence." State v. Besaw, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013), *review denied*. Questions of law, including whether the state has satisfied the foundational requirements for the admission of breath test results in a DUI prosecution, are subject to free review. State v.

Carson, 133 Idaho 451, 452, 988 P.2d 225, 226 (Ct. App. 1999); State v. Remsburg, 126 Idaho 338, 339, 882 P.2d 993, 994 (Ct. App. 1994).

C. The Trial Court Properly Denied Boehm's Motion *In Limine* Pending The Introduction Of Relevant Evidence At Trial

In reviewing Boehm's motion *in limine*, the trial court read the motion to be a challenge to the reliability of the test results and whether or not Boehm's breath alcohol content should be admitted at trial. (Tr., p.17, Ls.17-20.) Because that was a foundational question properly addressed at trial, the court denied the motion to see "how that evidence comes in, and if it comes in, how the jury weighs it in light of the [sic] some of the arguments that have been presented." (Tr., p.18, Ls.10-12.)

In State v. Dopp, 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996), the Idaho Court of Appeals stated, "It is within the discretion of the trial court to rule on a motion in limine prior to trial or to withhold a decision on the motion until the evidence is offered at trial." The Court explained the rationale for this discretion as follows:

> Because a motion in limine is based on an alleged or anticipated factual scenario, without the benefit of all the other actual evidence which will be admitted at trial, the trial judge will not always be able to make an informed decision regarding the admissibility of evidence prior to the time the evidence is actually presented at trial. It is often difficult, and sometimes impossible, for the trial judge to make a proper ruling without the benefit of all the other evidence admitted at trial . . .. The trial judge, in the exercise of his discretion, may decide that it is inappropriate to rule in advance on the admissibility of evidence based on a motion in limine, but may defer his ruling until the case unfolds and there is a better record upon which to make his decision.

Dopp, 129 Idaho at 603-604, 930 P.2d at 1045-1046 (quoting State v. Hester, 114 Idaho 688, 699-700, 760 P.2d 27, 38-39 (1988), and citing State v. Stuart, 110 Idaho 163, 715 P.2d 833 (1986), *overruled on other grounds*, State v. Tribe, 123 Idaho 721, 725 n.4, 852 P.2d 87, 91 n.4 (1993)).

The trial court in this case declined to make a pretrial ruling on the admissibility of certain evidence prior to trial because it was concerned that the evidence presented at trial would affect the admissibility of the evidence of Boehm's breath alcohol level. The court's decision to defer its ruling until trial was entirely proper. Boehm has failed to establish otherwise.

D. If This Court Considers The Underlying Argument Of Admissibility, Boehm Has Failed To Show Any Basis For Excluding Her Breath Test Results Based On Her Claim That ISP Did Not Comply With The Formal Rulemaking Requirements Of The IAPA In Adopting The SOPs For Breath Alcohol Testing

1. Nothing In I.C. § 18-8004(4) Requires Compliance With The Rulemaking Requirements Of The IAPA As A Prerequisite To The Admissibility Of Results Of BAC Testing Performed Pursuant To Methods Approved By ISP

Idaho's DUI statute states it is unlawful for a person with "an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle" on a road or place open to the public. I.C. § 18-8004(1)(a). Subsection (4), in turn, sets forth a formula of grams of alcohol per 210 liters of breath upon which upon which "an evidentiary test for alcohol concentration shall be based" and states that such breath tests shall be

performed by an approved laboratory or "by any other method approved by the Idaho state police." I.C. § 18-8004(4). That subsection continues:

> Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

I.C. § 18-8004(4).

As contemplated by I.C. § 18-8004(4), ISP has approved certain methods for breath alcohol testing and standards for the administration of such tests, and those approved methods have been set out by ISP in the form of "Standard Operating Procedures" and training manuals (hereinafter collectively "SOPs"). (See R., pp.34-123, 138-236); State v. Besaw, 155 Idaho 134, 140, 306 P.3d 219, 225 (Ct. App. 2013), *review denied*. Boehm does not contend that, in administering her breath test, Officer Neal failed to comply with any of the methods or procedures set forth in the SOPs. Rather, she argues the methods themselves are invalid because there is nothing in the record indicating that ISP complied with the rulemaking procedures of the IAPA, I.C. § 67-5201 *et seq.*, in adopting the SOPs. (Appellant's brief, pp.18-24.) Boehm's challenge to the *manner* in which ISP approved the methods for breath alcohol testing does not show any basis for exclusion of her breath test results because nothing in the governing law requires compliance with the rulemaking requirements of the IAPA as a prerequisite to the admissibility of results of BAC testing performed pursuant to methods approved by ISP.

Promulgation of rules is required under the IAPA only where "specifically authorized by statute." I.C. § 67-5231(1). The plain language of I.C. § 18-8004(4) states that, "[n]otwithstanding any other provision of law or rule of court," results of BAC testing "shall be admissible," without the necessity of producing expert testimony, if the test was "performed by a laboratory operated or approved by the Idaho state police *or by any other method approved by the Idaho state police*." (Emphasis added). Nothing in this statute authorizes or requires ISP to comply with the rulemaking requirements of the IAPA in approving the methods for determining an individual's breath alcohol concentration, nor does the statute make compliance with the IAPA a condition precedent to the admissibility of BAC test results in a criminal proceeding. To the contrary, the statute provides that such results are admissible if the test was performed by "any ... method approved by" ISP. I.C. § 18-8004(4). Because Boehm has never argued, much less demonstrated, that Officer Neal failed to comply with any of the methods set out in the SOPs in administering her breath test, she has failed to show any basis for exclusion of her test results in the criminal case.

The state recognizes the legislature *has* conferred rulemaking authority upon ISP for purposes of administrative license suspension proceedings. Specifically, I.C. § 18-8002A provides:

> (3) Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:
>
> (a) What testing is required to complete evidentiary testing under this section; and

> (b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1) (e) of this section will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. ...

I.C. § 18-8002A(3). By its plain language, however, the rulemaking authority granted by I.C. § 18-8002A does not extend to the approval of methods for breath alcohol testing contemplated by I.C. § 18-8004(4). To the contrary, the statute *limits* what ISP may prescribe by rule to the determinations of "[w]hat testing is required to complete evidentiary testing *under this section* [18-8002A]" and "[w]hat calibration or checking of testing equipment must be performed to comply with the department's requirements." The statute also mandates that any rule so prescribed recognize that, for purposes of the license suspension provisions of I.C. § 18-8002A, a test for breath alcohol concentration is valid "if the breath alcohol testing instrument was approved for testing by the Idaho state police *in accordance with section 18-8004*." In so doing, the legislature clearly indicated that the approval of breath testing equipment and methods required under I.C. § 18-8004 is not itself subject to the rulemaking requirements of the IAPA.

Idaho Code § 18-8004 does not require that ISP approve BAC testing methods by formal rulemaking. Therefore, Boehm's argument that the SOPs were not adopted pursuant to the formal rulemaking requirements of the IAPA is irrelevant to the admissibility of her breath test results under this section.

2. If ISP's Creation Of The SOPs Is Agency Action Governed By The Requirements Of The IAPA, Boehm's Exclusive Means For Challenging Such Action Was Through The Judicial Review Provisions Of The IAPA

Boehm argues that, because administrative license suspension hearings "held per I.C. § 18-8002A are agency action controlled by [the IAPA]," ISP's approval of methods for BAC testing for purposes of admissibility of test results under I.C. § 18-8004(4) must also be "agency action falling under the requirements of [the IAPA]." (Appellant's brief, p.23.) Boehm has failed to show that ISP's compliance or lack thereof with the formal rulemaking requirements of the IAPA is at all relevant to the determination of the admissibility of her breath test results under I.C. § 18-8004(4).

Nothing In I.C. § 18-8004(4) requires compliance with the rulemaking requirements of the IAPA as a prerequisite to the admissibility of results of BAC testing performed pursuant to methods approved by ISP. Idaho's DUI statute states it is unlawful for a person with "an alcohol concentration of 0.08, as defined in subsection (4) of this section, or more, as shown by analysis of his blood, urine, or breath, to drive or be in actual physical control of a motor vehicle" on a road or place open to the public. I.C. § 18-8004(1)(a). Subsection (4), in turn, sets forth a formula of grams of alcohol per 210 liters of breath upon which upon which "an evidentiary test for alcohol concentration shall be based" and states that such breath tests shall be performed by an approved laboratory or "by any other method approved by the Idaho state police." I.C. § 18-8004(4). That subsection continues:

> Notwithstanding any other provision of law or rule of court, the results of any test for alcohol concentration and records relating to calibration, approval, certification or quality control performed by a laboratory operated or approved by the Idaho state police or by any other method approved by the Idaho state police shall be admissible in any proceeding in this state without the necessity of producing a witness to establish the reliability of the testing procedure for examination.

I.C. § 18-8004(4).

As contemplated by I.C. § 18-8004(4), ISP has approved certain methods for breath alcohol testing and standards for the administration of such tests, and those approved methods have been set out by ISP in the form of "Standard Operating Procedures" and training manuals (hereinafter collectively "SOPs"). (See R., pp.34-123, 138-236); State v. Besaw, 155 Idaho 134, 140, 306 P.3d 219, 225 (Ct. App. 2013), *review denied.* Boehm does not contend that, in administering her breath test, Officer Neal failed to comply with any of the methods or procedures set forth in the SOPs. Rather, she argues the methods themselves are invalid because there is nothing in the record indicating that ISP complied with the rulemaking procedures of the IAPA, I.C. § 67-5201 *et seq.*, in adopting the SOPs. (Appellant's brief, pp.18-24.) Boehm's challenge to the *manner* in which ISP approved the methods for breath alcohol testing does not show any basis for exclusion of her breath test results because nothing in the governing law requires compliance with the rulemaking requirements of the IAPA as a prerequisite to the admissibility of results of BAC testing performed pursuant to methods approved by ISP.

Promulgation of rules is required under the IAPA only where "specifically authorized by statute." I.C. § 67-5231(1). The plain language of I.C. § 18-

8004(4) states that, "[n]otwithstanding any other provision of law or rule of court," results of BAC testing "shall be admissible," without the necessity of producing expert testimony, if the test was "performed by a laboratory operated or approved by the Idaho state police *or by any other method approved by the Idaho state police*." (Emphasis added). Nothing in this statute authorizes or requires ISP to comply with the rulemaking requirements of the IAPA in approving the methods for determining an individual's breath alcohol concentration, nor does the statute make compliance with the IAPA a condition precedent to the admissibility of BAC test results in a criminal proceeding. To the contrary, the statute provides that such results are admissible if the test was performed by "any ... method approved by" ISP. I.C. § 18-8004(4). Because Boehm has never argued, much less demonstrated, that Officer Neal failed to comply with any of the methods set out in the SOPs in administering her breath test, she has failed to show any basis for exclusion of her test results in the criminal case.

The state recognizes the legislature *has*, in a related statute, conferred rulemaking authority upon ISP for purposes of administrative license suspension proceedings. Specifically, I.C. § 18-8002A provides:

> (3) Rulemaking authority of the Idaho state police. The Idaho state police may, pursuant to chapter 52, title 67, Idaho Code, prescribe by rule:
>
> (a) What testing is required to complete evidentiary testing under this section; and
>
> (b) What calibration or checking of testing equipment must be performed to comply with the department's requirements. Any rules of the Idaho state police shall be in accordance with the following: a test for alcohol concentration in breath as defined in section 18-8004, Idaho Code, and subsection (1) (e) of this section

> will be valid for the purposes of this section if the breath alcohol testing instrument was approved for testing by the Idaho state police in accordance with section 18-8004, Idaho Code, at any time within ninety (90) days before the evidentiary testing. ...

I.C. § 18-8002A(3). By its plain language, however, the rulemaking authority granted by I.C. § 18-8002A does not extend to the approval of methods for breath alcohol testing contemplated by I.C. § 18-8004(4). To the contrary, the statute *limits* what ISP may prescribe by rule to the determinations of "[w]hat testing is required to complete evidentiary testing *under this section* [18-8002A]" and "[w]hat calibration or checking of testing equipment must be performed to comply with the department's requirements." The statute also mandates that any rule so prescribed recognize that, for purposes of the license suspension provisions of I.C. § 18-8002A, a test for breath alcohol concentration is valid "if the breath alcohol testing instrument was approved for testing by the Idaho state police *in accordance with section 18-8004*." In so doing, the legislature clearly indicated that the approval of breath testing equipment and methods required under I.C. § 18-8004 is not itself subject to the rulemaking requirements of the IAPA.

Idaho Code § 18-8004 does not require that ISP approve BAC testing methods by formal rulemaking. Therefore, Boehm's argument that the SOPs were not adopted pursuant to the formal rulemaking requirements of the IAPA is irrelevant to the admissibility of her breath test results under this section.

If Boehm is correct, however – and ISP's approval of BAC testing methods for purposes of I.C. § 18-8004(4) is agency action governed by the IAPA – Boehm had no standing to bring, and neither the lower courts nor this Court have

no jurisdiction to consider, a challenge to the manner in which ISP approved BAC testing methods as a basis for excluding the breath test result in the criminal case.

"Actions by state agencies are not subject to judicial review unless expressly authorized by statute." Laughy v. Idaho Dept. of Transp., 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) (citing I.R.C.P. 84(a)(1)); Johnson v. State, 153 Idaho 246, 250, 280 P.3d 749, 753 (2012) (same). Idaho Code § 67-5270 permits judicial review of final agency actions, including the failure of an agency to "issue a rule" or "to perform, any duty placed on it by law." See I.C. § 67-5201(3) (definition of "Agency action"); Laughy, 149 Idaho at 871, 243 P.3d at 1059 (summarizing "types of agency actions that could be reviewed by a court"). However, in order to be entitled to such review, the "person aggrieved by final agency action" must comply with the procedural requirements of I.C. §§ 67-5271 through 67-5279. I.C. § 67-5270(2); BV Beverage Co., LLC v. State, 155 Idaho 624, 627, 315 P.3d 812, 815 (2013); Laughy, 149 Idaho at 870, 243 P.3d at 1058. Where, as here, the aggrieved person is challenging the validity of a "rule," compliance with the procedural requirements necessary to obtain judicial review requires the person to, among other things: exhaust all available administrative remedies (I.C. § 67-5271), institute proceedings for review or declaratory judgment by filing a petition in the district court of the county in which the final agency action was taken or where the aggrieved person resides (I.C. § 67-5272(1)), file the petition within two years of the adoption of the rule being challenged (I.C. §§ 67-5231 and 67-5273), and make the agency a party to the

action (I.C. § 67-5278). Boehm did not comply with any of these procedural requirements, nor could she ever have done so in the criminal case.

From the beginning of this case, Boehm has sought a judicial ruling invalidating the SOPs for BAC testing based on ISP's failure to have complied with the formal rulemaking requirements of the IAPA in approving the testing methods contained in the SOPs. But Boehm herself did not comply with the judicial review provisions of the IAPA. To the state's knowledge, she did not attempt to pursue any available administrative remedies.[1] I.C. § 67-5271. Nor did she "institute" any "proceedings for review or declaratory judgment" by filing a timely petition in the district court of the appropriate county and naming ISP as a party to the action. I.C. §§ 67-5272, 67-5273, 67-5278. Instead, Boehm has attempted to have the SOPs invalidated as a basis for excluding her breath test result in the criminal case. Nothing in the IAPA or in any other statute, including I.C. § 18-8004, enables Boehm to challenge the validity of ISP's action in this forum and in this manner. Boehm's attempt to do so is, in her own words,

[1] The state confesses is not aware of any specific administrative remedy by which Boehm could challenge the validity of ISP's adoption of the SOPs and methods for BAC testing contained therein. Although I.C. § 18-8002A(7) allows for an administrative hearing when a person's driver's license has been suspended as a result of failing a BAC test, failure of ISP to comply with the rulemaking requirements of the IAPA in approving the methods for BAC testing is not one of the grounds upon which the license suspension may be vacated. In addition, I.C. § 67-5278 appears to contemplate that the validity of an agency rule may be challenged in an action for declaratory judgment, without the necessity of exhausting administrative remedies. See also Asarco, Inc. v. State, 138 Idaho 719, 69 P.3d 139 (2003) (mining companies did not have to exhaust administrative remedies before seeking judicial review of validity of state agency's action in issuing a total maximum daily load limit without complying with rulemaking requirements of the IAPA).

nothing more than an attempt to make "an end-run around the requirements" of the IAPA. (Appellant's brief, p.18.)

Because there is no statute that authorizes Boehm to raise ISP's noncompliance with the rulemaking requirements of the IAPA as a defense in the criminal case, Boehm lacked standing to bring the challenge and both the lower courts and this Court are without jurisdiction to consider it. See Laughy, 149 Idaho at 870, 243 P.3d at 1058 ("Without an enabling statute, the district court lacks subject-matter jurisdiction" to review agency action.). If the IAPA applies to ISP's actions in approving methods for breath testing, it also applies to bar Boehm's attempt to challenge those actions in the criminal case.

3. Even If This Court Entertains The Merits Of Boehm's Challenge To ISP's Approval Of BAC Testing Methods, Correct Application Of The Law Shows The SOPs Are Not Rules And, As Such, No Formal Rulemaking Was Required

The legislature has given ISP authority to prescribe by rule "[w]hat testing is required to complete evidentiary testing" for alcohol concentration under I.C. § 18-8002A and "[w]hat calibration or checking of testing equipment must be performed to comply with the department's requirements." I.C. § 18-8002(3)(a), (b). Pursuant to this authority, ISP has promulgated administrative "Rules Governing Alcohol Testing." See Idaho Administrative Code (IDAPA) 11.03.01, *et seq.* Relevant to this appeal is IDAPA 11.03.01.14.03, which governs the administration of breath alcohol testing. Specifically, the rule provides:

> **03. Administration**. Breath tests shall be administered in conformity with standards established by the department. Standards shall be developed for each type of breath testing

> instrument used in Idaho, and such standards shall be issued in the form of analytical methods and standard operating procedures.

IDAPA 11.03.01.14.03. Pursuant to its plain language – and consistent with the requirements of I.C. §§ 18-8002A and 18-8004(4) – this rule leaves to ISP the task of developing standards for the administration of breath tests and of issuing such standards "in the form of analytical methods and standard operating procedures." Nowhere in this rule or in the legislative mandate of I.C. §§ 18-8002A and 18-8004(4) is there any requirement that the SOPs themselves be established as rules in compliance with the IAPA.

On appeal, Boehm does not challenge the validity of IDAPA 11.03.01.14.03 or contend that that rule, which expressly authorizes ISP to establish methods for breath testing and issue them in the form of SOPs, was improperly properly promulgated. Instead, she argues that the SOPs themselves meet the legal definition of an agency "rule" and, therefore, compliance with the formal rulemaking requirements of the IAPA was required. (Appellant's brief, pp.18-24.) This Court should decline to entertain the merits of Boehm's argument.

Even if this Court does consider Boehm's challenge to the validity of ISP's action in adopting the SOPs without engaging in formal rulemaking, the challenge fails because the SOPs are not agency "rules" under the applicable law.

An agency action is a rule only where the action in question meets all of six characteristics. Asarco, Inc. v. State, 138 Idaho 719, 723, 69 P.3d 139, 143 (2003). Those characteristics include that the action in question "prescribes a

legal standard or directive not otherwise provided by the enabling statute," "expresses agency policy not previously expressed," and "is an interpretation of law or general policy." Id.; see also I.C. § 67-5201(19) (definition of "Rule"). Where an agency merely carries forth its assigned task without creating additional legal requirements or interpreting law or general policy it does not create rules subject to the procedures of the IAPA. See Sons and Daughters of Idaho, Inc. v. Idaho Lottery Comm'n., 142 Idaho 659, 663-64, 132 P.3d 416, 420-21 (2006) (Gaming Update not a rule where it did not prescribe a legal standard but merely explained existing rules); Idaho State Tax Comm'n v. Beacom, 131 Idaho 569, 570-72, 961 P.2d 660, 661-63 (1998) (adoption of tax form to carry out required function of self-reporting taxes not rulemaking function).

Applying the above principles, the Idaho Court of Appeals has already concluded that the rulemaking requirements of the IAPA do "*not* apply when the Idaho state police approves the methods for determining an individual's alcohol concentration." State v. Alford, 139 Idaho 595, 597, 83 P.3d 139, 141 (Ct. App. 2004) (emphasis added). In Alford, the defendant sought to exclude his BAC test result on the basis that ISP did not comply with the rulemaking requirements of the IAPA when it approved the use of the Alco-Sensor III, the breath-testing device used in Alford's case. Id. at 597-98, 83 P.3d at 141-42. Citing the characteristics of agency rules identified by the Idaho Supreme Court in Asarco, *supra*, the Court of Appeals determined "the Idaho state police action approving the use of the Alco-Sensor III was not rulemaking" because it neither prescribed

any new legal standard or agency policy nor interpreted any law. Id. The court reasoned:

> The DUI statute already prescribes the legal standard limiting an individual's alcohol concentration. Alford has failed to demonstrate that any Idaho state police policy was expressed, or that any law or policy was interpreted, by the approval of the Alco-Sensor III. Instead, the Idaho state police properly carried out a statutory duty to authorize the use of certain breath-testing equipment by law enforcement agencies. In doing so, it identified equipment that it found to be suitable for such purpose. It did not create additional legal requirements. Thus, the state was not required to provide evidence of Idaho state police compliance with IAPA in approving the use of the Alco-Sensor III.

Id. at 598, 83 P.3d at 142.

Boehm has not even cited Alford, much less attempted to distinguish it. Nor can she. Just as the approval of breath-testing equipment is not rulemaking, neither is the approval of methods to conduct such testing according to the standards of I.C. § 18-8004(4). As correctly observed by the Court of Appeals in Alford, I.C. § 18-8004 "already prescribes the legal standard limiting an individual's alcohol concentration." Alford, 139 Idaho at 598, 83 P.3d at 142. The methods for BAC testing set forth in the SOPs do not prescribe any new legal standard for DUI, nor do they interpret any existing law or policy. To the contrary, the state police action in adopting the SOPs was merely the carrying out of the legislative directive to approve methods for BAC testing pursuant to the statute. While compliance with the methods so approved is a prerequisite to the admissibility of breath test results in the absence of expert testimony, this legal requirement exists by virtue of the enabling statute itself, see I.C. § 18-8004(4), not because of any action on the part of ISP.

The methods for BAC testing set forth in the SOPs do not create any binding law or policy; they are merely procedural standards that, if followed by law enforcement, permit a BAC test result to be introduced in a criminal proceeding with the necessity of expert testimony pursuant to I.C. § 18-8004(4). Because the SOPs do not themselves prescribe or interpret any law, they are not "rules" to which the formal rulemaking requirements of the IAPA apply. Boehm's arguments to the contrary are without merit and do not establish any basis to exclude her BAC test results from trial.[2]

IV.
Boehm Has Failed To Show Error In The Denial Of Her Motion To Withdraw Her Guilty Plea Based On The United State Supreme Court's Recent Decision In *Missouri v. McNeely*[3]

A. Introduction

Boehm argues on appeal the district court erred in upholding the trial court's denial of her motion to withdraw her guilty plea because "*McNeely* changed Fourth Amendment jurisprudence in a fashion that affected the validity of Idaho's warrantless breath testing and implied consent scheme and the defendant should have been given a chance to raise the issue." (Appellant's brief, p.24.) Boehm's argument fails. Correct application of the law supports the

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[2] Even if compliance with the rulemaking requirements of the IAPA in approving the methods for BAC testing contained in the SOPs were a prerequisite to the *expedient* admissibility of BAC test results under I.C. § 18-8004(4), the inability of the state to show such compliance would not, by itself, be grounds for excluding the test result. "Rather, the State, as a second option, may call an expert witness to establish the reliability of the test, thereby making test results admissible." State v. Healy, 151 Idaho 734, 737, 264 P.3d 75, 78 (Ct. App. 2011) (citation omitted); see also I.C. § 18-8004(4).

[3] Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552 (2013).

lower courts' determinations that implied consent is still a valid exception to the warrant requirement and that Boehm impliedly consented to a breath test in this case.

B. Standard Of Review

The standard of review applicable to a decision rendered by a district court in its intermediate appellate capacity is set forth in Section I.B., *supra*, and is incorporated herein by reference.

"Appellate review of the denial of a motion to withdraw a plea is limited to whether the district court exercised sound judicial discretion as distinguished from arbitrary action." State v. Hanslovan, 147 Idaho 530, 535-536, 211 P.3d 775, 780-781 (Ct. App. 2008) (citing State v. McFarland, 130 Idaho 358, 362, 941 P.2d 330, 334 (Ct. App. 1997)). An appellate court will defer to the trial court's factual findings if they are supported by substantial competent evidence. State v. Holland, 135 Idaho 159, 15 P.3d 1167 (2000); Gabourie v. State, 125 Idaho 254, 869 P.2d 571 (Ct. App. 1994).

C. Boehm Has Failed To Establish The McNeely Opinion Provided A Just Reason For The Withdrawal Her Guilty Plea

Motions to withdraw a guilty plea are governed by I.C.R. 33(c), which provides:

> (c) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

Pursuant Rule 33(c), a motion to withdraw made before sentencing may be liberally granted, but must be granted only if the defendant proves either that the plea was not knowingly, intelligently and voluntarily made or that there is another just reason for withdrawal of the guilty plea. State v. Hanslovan, 147 Idaho 530, 535-36, 211 P.3d 775, 780-81 (Ct. App. 2008) (citing State v. Rodriguez, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990)). Because the opinion in McNeely did not, as Boehm contends, invalidate Idaho's implied consent statute, Boehm has failed to show the court abused its discretion in denying her motion to withdraw her guilty plea, finding the McNeely case was "distinguishable" from the circumstances of Boehm's case. (Tr., p.74, Ls.17-18.) As discussed below, because the decision in Missouri v. McNeely did not eliminate implied consent as it pertains to evidentiary testing of individuals who are believed to be driving under the influence, Boehm has failed to establish the denial of her motion to withdraw her guilty plea on the basis of new law was in error.

The Fourth Amendment prohibits unreasonable searches and seizures. "A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement." State v. Kerley, 134 Idaho 870, 873, 11 P.3d 489, 492 (Ct. App. 2000) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); see also State v. Ferreira, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999).) Consent is such an exception to the warrant requirement, and may be implied under Idaho's implied consent statute, I.C. § 18-8002(1). State v. Diaz, 144 Idaho 300, 302-03, 160

P.3d 739, 741-42 (2007); State v. LeClercq, 149 Idaho 905, 907-08, 243 P.3d 1093, 1095-96 (Ct. App. 2010). Under that statute "the State is entitled to conduct blood or breath-alcohol concentration tests of drivers suspected of DUI, and neither a suspect's Fifth Amendment right against self-incrimination nor his Fourth Amendment right against unreasonable searches is violated by such testing if it is conducted in a reasonable manner." State v. Green, 149 Idaho 706, 709, 239 P.3d 811, 814 (Ct. App. 2010); see also State v. Wagner, 149 Idaho 268, 270, 233 P.3d 199, 201 (Ct. App. 2010) (citing I.C. § 18-8002(1)).

By accepting the privilege of driving on Idaho's roadways, Boehm impliedly consented to evidentiary testing to determine her alcohol concentration, provided such "testing [was] administered by a peace officer with reasonable grounds for suspicion of DUI." LeClercq, 149 Idaho at 909, 243 P.3d at 1097 (citing State v. DeWitt, 145 Idaho 709, 712, 184 P.3d 215, 218 (Ct. App. 2008); I.C. § 18-8002(1)). It is undisputed that, at the time Officer Neal administered the breath test to Haynes in this case, he had reasonable suspicion that Boehm was driving under the influence: She smelled like alcohol, she was "swaying back and forth" and "slurring her words," and she failed field sobriety tests. (R., p.21.) It is also undisputed that the officer conducted the evidentiary testing in a reasonable manner: He read out loud the ALS advisories for Boehm and asked her if she understood the form. (R., p.22.) The officer checked Boehm's mouth and monitored her for the required observation period and then administered the test. (Id.) Because Officer Neal had reasonable suspicion of DUI, and because the record shows the officer acted reasonably in administering the evidentiary

testing, the warrantless testing was justified by Boehm's implied consent to submit to such testing as a condition of driving on Idaho's roads.

Boehm argues otherwise. Specifically she argues that, after the U.S. Supreme Court's decision in Missouri v. McNeely, ___ U.S. ___, 133 S.Ct. 1552 (2013), implied consent is no longer a recognized exception to the warrant requirement. (Appellant's brief, pp.26-36.) Boehm's assertion that McNeely – a case addressing the exigent circumstances exception to the warrant requirement – did away with the implied consent exception to the warrant requirement, or re-wrote Idaho's implied consent statute, does not withstand scrutiny.

This Court has clearly stated that consent and exigent circumstances are *different exceptions* to the warrant requirement. Diaz, 144 Idaho at 302, 160 P.3d at 741 ("Exigency, however, is not the lone applicable exception here; consent is also a well-recognized exception to the warrant requirement."). The Supreme Court of the United States recognized this as well in McNeely. In that case the only question before the Court was "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." McNeely, 133 S.Ct. at 1556. The Court held that "exigency in this context must be determined case by case based on the totality of the circumstances." Id. Thus, the issue was limited to "*nonconsensual* blood testing" (emphasis added) and the holding was limited to the exigent circumstances exception. Thus, consensual breath tests, such as at

issue in this case, were not within the scope of either the issue or the holding in McNeely.

In arguing that implied consent is no longer a valid exception to the warrant requirement, Boehm summarizes the McNeely holding as follows: "[A] warrantless evidentiary test in a DUI case is presumptively unconstitutional, and a person does have the right to refuse to do the test until a warrant has been secured or an exception to the warrant requirement exists." (Appellant's brief, p.30.) Even assuming, without conceding, that McNeely overruled Idaho precedent holding that a driver has no right to *revoke* his or her implied consent to warrantless evidentiary testing, it did not invalidate the implied consent exception *in toto*. To the contrary, in addressing whether a case-by-case analysis under the exigency exception would "undermine the governmental interest in preventing and prosecuting drunk-driving offenses," the Court specifically observed that states would still "have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws," including "implied consent laws." McNeely, 133 S.Ct. at 1565-66. The Court also cited with approval its prior decision in North Dakota v. Neville, 459 U.S. 553 (1983), which held that evidence of a defendant's refusal to take a blood test under implied consent laws is constitutionally admissible evidence of his guilt. McNeely, 133 S.Ct. at 1566. Thus, far from holding that the state may not legally imply consent by a motorist, the Court apparently endorsed implied consent laws.

In addition, to the extent McNeely compels the conclusion that a driver may revoke his or her implied consent to warrantless BAC testing, such conclusion is irrelevant under the facts of this case. Unlike McNeely, who refused to submit to evidentiary testing, Boehm submitted without objection to the breath test in this case. (R., pp.17, 22.) Having done so, and having otherwise impliedly consented to evidentiary testing as a condition of using Idaho's roads, Boehm cannot successfully complain that the warrantless testing violated her constitutional rights.

Implied consent is an exception to the warrant requirement different than actual consent, such that the state does not have to prove that a motorist who submitted to a BAC test under implied consent gave actual consent. State v. Nickerson, 132 Idaho 406, 409-10, 973 P.2d 758, 761-62 (Ct. App. 1999) (argument that "consent ... was involuntary is of no consequence because [motorist] had impliedly consented"). The argument that implied consent must also meet the requirements of actual consent such as voluntariness has been "roundly rejected." LeClercq, 149 Idaho at 911-12, 243 P.3d at 1099-100. It is quite clear in the law that application of the implied consent exception is not contingent upon the motorist having provided actual consent as well. Because the breath test in this case was justified by Boehm's implied consent, the state did not have to demonstrate that Boehm's actual consent was voluntary.

Because Boehm has failed to establish a change in the law governing implied consent which would have justified the withdrawal of her guilty plea, the

district court's appellate decision affirming the magistrate's order denying Boehm's' motion to withdraw her guilty plea should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's intermediate appellate decision affirming Boehm's convictions for misdemeanor DUI and DWP.

Dated this 30th day of September, 2014.

NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 30th day of September, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

JAY W. LOGSDON
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